No. 76-637

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUSSELL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-18a) is reported at 537 F. 2d 474.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1976. A timely motion to amend the judgment or for rehearing *en banc* was denied on October 5, 1976 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on November 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Regional Administrator of the General Services Administration exceeded his authority by refusing to execute an agreement for exchange of petitioner's property for property owned by the United States, which had a value of $300,000 more than petitioner's

property when proposed zoning changes were taken into account.

STATEMENT

Petitioner, the Russell Corporation (Russell), filed a petition in the Court of Claims seeking $891,610 in damages based on the United States' refusal to carry out a proposed exchange of 120 acres of federally owned land for $15,000 in cash plus certain land owned by Russell in East Denver, Colorado. The privately owned land had a fair market value of $405,000, and the federally owned land was valued at $720,000 (Pet. App. 2a).

Negotiations between Denver officials of the General Services Administration (GSA) and Russell concerning the exchange began in 1968 (Pet. App. 2a). Initial appraisals, based on existing zoning, valued the Russell property at $405,000 and the federal land at $420,000 (Pet. App. 2a).

On July 29, 1969, Russell submitted a formal offer to GSA conditioned on a January 1, 1970, closing date, (Trial Judge's Finding of Fact, No. 14). On August 5, 1969, GSA's Regional Administrator forwarded Russell's offer to the Commissioner for the Public Building Service (PBS) of the GSA for approval. The PBS and the Property Management and Disposal Service (PMDS) of the GSA jointly recommended to the GSA Administrator that further steps be taken toward consummation of the exchange. The joint memorandum advised the GSA Administrator that, prior to completion of the exchange, regional officials would review the appraisals in accordance with the September 4, 1969, "All Regions Memorandum" to make sure that there had been no significant change in the proposed zoning of the government-owned land or in the value of the property (Pet. App. 9a-10a).

On February 19, 1970, after obtaining the concurrence of the GSA Administrator, the Deputy Commissioner of PBS gave the Regional Administrator qualified authority to conclude the exchange. According to this directive, the exchange could be completed provided that (1) updated appraisals for both properties were obtained; (2) such updated appraisals included consideration of possible zoning changes as required by the September 4, 1969, "All Regions Memorandum"; and (3) the Regional Administrator, after consideration of the updated appraisals, advised the central office of his proposed actions and of any unusual circumstances in the matter (Pet. App. 13a). See Pet. App. 8a.

On March 26, 1970, the PBS Regional Director specifically advised Russell's president, in a telephone conversation, that no decision concerning the exchange would be made prior to April 6, 1970. During the conversation, Russell's president expressed disappointment and reminded the PBS Regional Director that Russell had been "on the hook" for over a year and a half (Finding of Fact, No. 23).

Updated appraisals prepared by an independent contract appraiser were obtained on March 4, 1970; however, the appraisals did not comply with GSA requirements because they did not consider valuations based on rezoning for the highest and best use of the federal properties (Pet. App. 13a). Cf. Pet. App. 15a-16a. On March 27, 1970, the PMDS appraisal staff chief advised the PBS Regional Director that the government's property would have an estimated value of $720,000 if the property were rezoned "R-C." The PMDS appraisal staff chief, after consultation with officials of the County Zoning Board concerning the possibility of rezoning for high density occupancy, concluded that the possibility of rezoning for high density occupancy was very real and that

development would come very rapidly (Findings of Fact, Nos. 24, 25). On April 6, 1970, at a meeting attended by the Regional Administrator, the PBS Regional Director, the PMDS Regional Director and other GSA officials, the Regional Administrator decided that GSA should not go forward with the exchange. Russell's president, who was notified by telephone, asked for return of the earnest money deposited with GSA, and threatened to sue for damages (Pet. App. 16a).

By letter dated April 9, 1970, the PBS Regional Director confirmed the telephone call, advised Russell that the federal property had a value in excess of $700,000 and indicated that, if Russell decided to consummate an exchange based on that figure, PBS would discuss the matter (Findings of Fact. Nos. 27, 28).

After a further exchange of correspondence, Russell brought suit to recover damages for breach of contract. At trial, Russell did not challenge the PMDS appraisal that, as of March 1970, the Government's property had a fair market value which exceeded the Russell property by at least $300,000 (Finding of Fact, No. 31).

The trial judge made extensive findings of facts and issued a recommended decision which the Court of Claims affirmed and adopted as the basis for its decision (Pet. App. 1a). In dismissing the claim, the court found (Pet. App. 11a) that, under GSA procedures, no GSA official acting alone had authority to enter into a binding exchange agreement; that the Regional Administrator had overall responsibility for operations and was the official designated to execute contractual documents on behalf of GSA; and that no contract could be concluded without the Regional Administrator's assent. The court further found that, throughout the negotiations, Russell

knew of the limitations on the authority of the GSA officials with whom it was negotiating; knew that the regulations required the properties to be exchanged to have equivalent values; and was aware that updated appraisals would have to be obtained and approved before an agreement to exchange the properties could be consummated (Pet. App. 12a, 17a). Stating that creation of a contract implied-in-fact (while not requiring the execution of an agreement) requires that acceptance of an offer be manifested by conduct indicating assent to the proposed bargain (Pet. App. 12a), the court found that the Regional Administrator had rejected Russell's offer on April 6, 1970, and that, up to that time, Russell knew that under the regulations additional actions remained to be completed before a contract could come into existence (Pet. App. 12a, 13a). In addition, the court found (Pet. App. 15a) that the Regional Administrator had authority to reject Russell's offer and that the rejection had a reasonable basis.

ARGUMENT

The decision is correct and presents no issue of general importance.

The procedures of the GSA permit approval of a proposed land exchange only if (1) updated appraisals exist that value the properties at their highest and best use giving due regard to possible zoning changes, and (2) the properties in the exchange are of substantially equivalent value (Pet. App. 13a, 17a). The GSA Administrator's approval of the exchange was clearly conditioned on compliance with these two requirements (Pet. App. 8a, 9a, 13a). Not only did the updated independent contract appraisals on which petitioner relies fail to value the government's land at its highest and best use based on possible zoning changes, but also petitioner concedes that the government's land had a value exceeding that of the Russell property by $300,000 (Pet. App. 13a, 2a). Thus

the Regional Administrator lacked authority to approve the exchange and had no choice but to reject Russell's offer. Under the circumstances, the Court of Claims properly held that there was no final agreement and that Russell is not entitled to damages for breach of contract.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.